

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re Applications of)	
)	
AMERITECH CORPORATION,)	
Transferor,)	
)	
AND)	
)	CC Docket No. 98-141
SBC COMMUNICATIONS, INC.)	
Transferee)	
)	
For Consent to Transfer Control of)	
Corporations Holding Commission)	
Licenses and Lines Pursuant to Sections)	
214 and 310(d) of the Communications Act)	
and Parts 5, 22, 24, 25, 63, 90, 95, and 101)	
of the Commission's Rules)	

**SBC'S OPPOSITION TO
PETITION FOR DECLARTORY RULING**

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I. INTRODUCTION

On September 9, 2004, a group of CLECs filed a petition¹ requesting that the Commission issue a declaratory ruling that Condition 17 of the *SBC/Ameritech Merger Order*,² which requires SBC to offer certain UNEs for a limited period of time, remains in effect. Although couched as a request for interpretation, the CLECs' request actually would require a re-write of the plain terms of Condition 17, extending its duration well beyond that contemplated

¹ Applications of Ameritech Corporation, Transferor and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, *Petition for Declaratory Ruling*, CC Docket No. 98-141 (Sept. 9, 2004)("Petition").

² Applications of Ameritech Corporation, Transferor and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, *Memorandum Opinion and Order*, 14 FCC Rcd. 14712, FCC 99-279, CC Docket No. 98-141 (Oct. 8, 1999)("SBC/Ameritech Merger Order").

by SBC when it offered its merger commitments to the Commission. As discussed below, the CLECs are simply wrong in their assertion that Condition 17 remains in force. No amount of rhetoric can alter the fact that, under its plain terms, Condition 17 sunset on March 24, 2003, the date the D.C. Circuit's *USTA I*³ decision became final and non-appealable, as the Commission Staff (which has by no means been reluctant to embrace a robust interpretation of the merger conditions) itself has acknowledged. Nor can the Commission modify those terms to lengthen the duration of Condition 17. Accordingly, the Commission should deny the CLECs' petition.

II. CONDITION 17 SUNSET ON MARCH 24, 2003

The plain terms of Condition 17 are clear that it sunset on March 24, 2003, when the Commission's *UNE Remand Order* became final and non-appealable. In its entirety, Condition 17 provides:

SBC/Ameritech shall continue to make available to telecommunications carriers, in the SBC/Ameritech Service Area within each of the SBC/Ameritech States, such UNEs or combinations of UNEs that were made available in the state under SBC's or Ameritech's local interconnection agreements as in effect on January 24, 1999, under the same terms and conditions that such UNEs or combination of UNEs were made available on January 24, 1999, until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area. *This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable Commission order in the UNE remand proceeding.*⁴

As with many of the merger conditions, the beginning and end points of the duration of Condition 17 were triggered by the occurrence of future events rather than specific dates. Thus, the requirements of Condition 17 were to begin 10 business days after the merger closed.⁵ At the

³ *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), cert. denied 123 S.Ct. 1571 (2003) ("*USTA I*").

⁴ *SBC/Ameritech Merger Order*, App. C ¶ 53 (emphasis added).

⁵ *SBC/Ameritech Merger Order*, App. C ¶ 1.

other end, Condition 17 ceased to operate upon the occurrence of a specific, future triggering event rather than a specific date, *i.e.*, the effective date of a final and non-appealable Commission order in the UNE remand proceeding. The Commission's *UNE Remand Order* became final and non-appealable on March 24, 2003, when the D.C. Circuit's subsequent *USTA I* decision vacating the *UNE Remand Order* became final and non-appealable. By its own terms, therefore, Condition 17 sunset on March 24, 2003.

No other conclusion is consistent with the language of the last sentence of Condition 17, which the CLECs fail to address at all in their petition. That conclusion, moreover, is not merely SBC's interpretation. In their most recent audit report of SBC's compliance with the merger conditions, Ernst & Young—*with the concurrence of the Commission Staff*—concluded that Condition 17 sunset on March 24, 2003.⁶ There simply is no basis for claiming that SBC remains subject to the terms of Condition 17.⁷

Without actually addressing the last sentence of Condition 17, the CLECs nonetheless insist that the plain terms of Condition 17 mean something other than what they say. To achieve this linguistic feat, the CLECs focus solely upon a single phrase from the Commission's order approving the merger subject to the merger conditions. Through these gyrations, the CLECs claim that the phrase "the UNE remand proceeding" in Condition 17 means not only the UNE

⁶ See Letter from Michelle A. Thomas, Executive Director—Federal Regulatory, SBC Telecommunications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 98-141 (Aug. 30, 2004), Tab 2, Att. A at 2.

⁷ The CLECs make the preposterous claim that the *UNE Remand Order* is not final and non-appealable because "a vacated decision is not an order at all, and is certainly not "final" given that the Court of Appeals remanded it to the Commission for further consideration." *Petition* at 12. A vacatur certainly removes the force and effect of a Commission order, but it does not somehow transmogrify an order into some other species of document. Moreover, the fact that the *Triennial Review* proceeding was conducted pursuant to the D.C. Circuit's remand of *UNE Remand Order* is immaterial to the question of whether the *UNE Remand Order* itself has become final and non-appealable. There is no doubt that the *UNE Remand Order* became no longer appealable, and thus final, on March 24, 2003.

remand proceeding but also “any subsequent proceeding.”⁸ The CLECs thus claim that Condition 17 continues to operate and will not sunset so long as the Commission continues to consider the scope of its unbundling rules.⁹ The CLECs’ position should be rejected out of hand.

As an initial matter, it is the terms of the merger conditions themselves that govern this issue, not the Commission’s short-hand description of those conditions in its adopting order. The Commission made clear in the *SBC/Ameritech Merger Order* that “[t]he specific conditions that we adopt in the merger proceeding are set forth in Appendix C to this Order.”¹⁰ Accordingly, in the Ordering Clauses of the *SBC/Ameritech Merger Order*, the Commission made clear that the specific obligations it imposed on SBC are contained in Appendix C to the *SBC/Ameritech Merger Order*.¹¹ Moreover, where the Commission intended to modify the language of SBC’s merger commitments it did so by adding footnotes to the commitments themselves. The Commission’s general description in the narrative of its order is just that—a general description—and the CLECs’ attempt to substitute that general language for the actual terms of the conditions adopted by the Commission are unavailing.

Moreover, even if it were necessary or appropriate to look to the narrative of the Commission’s order in interpreting the scope of the merger conditions, the language in that narrative must be read in harmony with the actual language of the merger commitments themselves. With respect to Condition 17, that language is crystal clear: Condition 17 sunset upon the date of a final and non-appealable order in a single Commission proceeding—the UNE remand proceeding. Including additional Commission proceedings other than the UNE remand proceeding in the duration of Condition 17, and thus protracting the timeline for triggering

⁸ *Petition* at 13-14.

⁹ *Id.*

¹⁰ *SBC/Ameritech Merger Order* ¶ 354 n. 663.

¹¹ *Id.* ¶ 584 (“IT IS FURTHER ORDERED that as a condition of this grant SBC and Ameritech shall comply with the conditions set forth in Appendix C of this Order.”).

Condition 17's sunset, is fundamentally and plainly inconsistent with the language of Condition 17. Interpreting the triggering event for the sunset of Condition 17 to include any additional Commission proceedings would thus violate common rules of construction because it would suggest that the Commission intended to include inconsistent provisions in the same document. Accordingly, the CLECs' revisionist interpretation of Condition 17's sunset provision must be rejected.

The CLECs' interpretation also must be rejected because it effectively nullifies the sunset provision in Condition 17. Under the CLECs' interpretation, Condition 17 never sunsets so long as the Commission has an open proceeding to consider the scope of its unbundling rules. The Commission, however, remains free to revisit its unbundling rules and could even subject such rules to ongoing periodic review, precisely as it did in its *UNE Remand Order*, in which it established its triennial review process.¹² Thus, under the CLECs' theory, Condition 17 would effectively never sunset. That simply can not be squared with the clear language of Condition 17 or with the "Commission's policy, as stated in the *SBC/Ameritech Merger Order*, to obligate SBC's compliance with the merger conditions for a finite period of time."¹³ It also is inconsistent with the Commission's policy articulated in the *Triennial Review Order* that "it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this order."¹⁴ Both to remain consistent with rules of construction and faithful to Commission policy, Condition 17 must mean what it says: Condition 17 became null and void on the date its November 5, 1999, *UNE Remand Order* became final and non-appealable—March 24, 2003.

¹² *UNE Remand Order* ¶ 151.

¹³ Letter from William Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to Jim Lamoureux, Senior Counsel, SBC Communications, Inc., CC Docket No. 98-141 (April 26, 2004).

¹⁴ *Triennial Review Order* ¶ 705.

That conclusion, moreover, is fully consistent with the purpose underlying Condition 17. In order to understand that purpose, and thus the intended sunset date for Condition 17, it is important to understand the correct sequence of events surrounding the proposal and adoption of SBC's commitment embodied in Condition 17. Unfortunately, the CLECs rely upon a false chronology of events—and in particular an inaccurate portrayal of the relationship in time between Condition 17 and the UNE remand proceeding and subsequent appeal of the *UNE Remand Order*—in their attempt to divine a purpose that is nowhere to be found in Condition 17.

The CLECs assert that Condition 17 was drafted in the “fall of 1999” because “the Bell Companies were indicating that they were likely to sue again when replacement regulations were adopted in the UNE remand proceeding.”¹⁵ The CLECs thus claim that it was “at this juncture that the Commission considered” SBC's petition for approval of the merger, and that the Commission adopted Condition 17 “to remedy the ongoing suppression of competition imposed by the destabilizing unbundling litigation.”¹⁶ It is this chronology upon which the CLECs rely for their sweeping proposition that Condition 17 was designed “to guarantee CLEC access to a minimum set of UNEs throughout the period of intermediate twists and turns likely to occur until section 251(c)(3) was at last implemented through final, non-appealable rules.”¹⁷ The CLECs, however, have their chronology wrong. The correct chronology demonstrates that the intent of Condition 17 was more limited: it was designed solely to address the uncertainty created by the pendency of the UNE remand proceeding itself, as well as subsequent judicial appeals of that proceeding—and that proceeding alone. It was not intended to address, *ad infinitum*, any uncertainty that might be created by any other subsequent Commission or judicial proceedings.

¹⁵ *Petition* at 3.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 2.

The CLECS either deliberately ignore or casually forget the fact that SBC submitted its proposed merger commitments to the Commission well before the *UNE Remand Order* had been adopted or released. In fact, as the *SBC/Ameritech Merger Order* itself notes, SBC formally submitted its proposed commitments to the Commission on July 1, 1999.¹⁸ At that time, the Commission was in the midst of its UNE remand proceeding. Indeed, initial comments had been filed in the UNE remand proceeding (on May 26, 1999) less than two months before SBC submitted its proposed commitments to the Commission, and the Commission would not issue its order until November 5, 1999, four months after SBC submitted its proposed commitments.

Thus, it is illogical and historically inaccurate to claim that Condition 17 was designed as a hedge against subsequent Commission proceedings resulting from “unbundling litigation”¹⁹ surrounding the *UNE Remand Order*. There was at best only a faint prospect of an appeal of the Commission’s *UNE Remand Order* at the time SBC submitted its commitments to the Commission. Rather, at that time there was only, (1) an absence of UNE rules as a result of the Supreme Court’s decision in *Iowa Utilities Board*, and (2) an ongoing Commission proceeding to put in place new rules at some as of yet unknown date. The intent of Condition 17 was not to “guarantee CLEC access to a minimum set of UNEs throughout the period of intermediate twists and turns likely to occur until section 251(c)(3) was at last implemented through final, non-appealable rules,” or “to serve, if needed, as a bridge to the promised land of certain UNE rules.”²⁰ Rather, it was far more specific and far less grandiose. It was intended only to operate

¹⁸ See, e.g., *SBC/Ameritech Merger Order* ¶ 45 (SBC submitted its proposed conditions on July 1, 1999, and clarified the conditions on August 27, 1999, and in *ex parte* submissions in early September).

¹⁹ *Petition* at 4; see also *id.* at 6 (the merger conditions were adopted to assure “that the competitive choices available to more than half of the nation’s consumers would not be stifled by Bell refusals to provide network elements that Congress intended to unbundle but that were thrown into limbo by temporary setbacks in the unbundling litigation.”)

²⁰ *Petition* at 2.

until the Commission could issue an order in its UNE remand proceeding, including defending the order resulting from that proceeding in subsequent judicial proceedings.²¹

This conclusion is further supported by the additional provision—which is the only one the CLECs actually address—that Condition 17 sunset on the “date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech.”²² As the Commission itself has held, the D.C. Circuit’s decision in *USTA I* did precisely that—it eliminated the Commission’s UNE rules at issue, and, in doing so, it provided that those UNEs were no longer required to be provided. Specifically, the Commission held in its *Triennial Review Order* that, upon the *USTA I* decision becoming “final and no longer subject to further review . . . the legal obligation [to provide UNEs] *will no longer exist*.”²³ That determination – which no party challenged in the D.C. Circuit – is binding and confirms that Condition 17 is no longer in effect.²⁴

The CLECs nonetheless claim that this provision of Condition 17 was not triggered because Condition 17 requires “*a final, non-appealable judicial determination that a particular UNE could not be required under any circumstances consistent with federal law, such that no*

²¹ Nor did “[t]he Commission and the public interest demand these commitments.” *Petition* at 2. As discussed above, they were proposed by SBC, and the Commission accepted them as sufficient to render the transfer of licenses and authorizations from Ameritech to SBC in the public interest.

²² *SBC/Ameritech Merger Order* App. C, ¶ 53. The CLECs also appear to raise a strawman argument as to the third sunset provision in Condition 17, which provides that Condition 17 sunsets on “the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area.” See *Petition* at 12-15. SBC has never claimed that this sunset provision has been triggered. Nor has SBC ever claimed, as the CLECs also allege (albeit without citation), see *Petition* at 15-16, that the general three year sunset provision in the merger conditions applies to Condition 17.

²³ *Triennial Review Order* ¶ 705 (emphasis added).

²⁴ In 2000, the Chief of the FCC’s Common Carrier Bureau reached the same interpretation of identical merger compliance in analogous circumstances, finding that a final and non-appealable court decision vacating and remanding the FCC’s pricing rules would eliminate Verizon’s obligation under that condition to offer UNEs at TELRIC prices. See Letter to Verizon from Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC, 15 FCC Rcd 18327 (2000). As discussed above, the 2003 Audit Report of SBC’s compliance with its merger conditions demonstrates that the Enforcement Bureau has similarly determined that Condition 17 sunset on March 24, 2003. See *supra* at 3.

remand to the Commission was necessary.”²⁵ That “requirement,” however, is a complete fabrication; it is found nowhere in Condition 17, nor can it be found in the Commission’s order approving the merger and SBC’s merger commitments. Nevertheless, the CLECs argue that the phrase “a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided” means that a court must “make findings as to whether section 251 ultimately requires unbundling of high-capacity loops, transport, and switching”²⁶ before the additional sunset provision of Condition 17 is triggered. In essence, the CLECs argue that the additional sunset provision of Conditions requires a judicial finding of non-impairment. Not only is there no authority in the merger conditions or the Commission’s order for such a restrictive definition, the CLEC’s reading would make no sense. The verb “providing” in Condition 17 requires only a result: the elimination of the requirement to provide UNEs. It does not require any particular path to that result, such as a finding of non-impairment. Accordingly, the only sensible interpretation of the additional sunset provision of Condition 17 is that in vacating the Commission’s UNE rules and eliminating SBC’s obligation to provide those UNEs—thus producing the result specified in Condition 17—the D.C. Circuit “provided” that those UNEs were no longer required to be provided.

In the *Shared Transport Forfeiture Order*,²⁷ the Commission acknowledged as much. In particular, the Commission acknowledged that similar language in Condition 19 (the shared transport condition) “expressly provides” that it sunsets once a court “issue[s] a final non-appealable order to [the] effect” that “SBC is not required to provide shared transport.”²⁸ The Commission went on to assert, incorrectly, that the D.C. Circuit’s *USTA I* decision had not

²⁵ *Petition* at 11.

²⁶ *Petition* at 11.

²⁷ SBC Communications, Inc. Apparent Liability for Forfeiture, *Forfeiture Order*, FCC 02-282 (Oct. 9, 2002)(“Shared Transport Forfeiture Order”).

²⁸ *Id.* ¶ 19.

triggered the sunset provision in paragraph 56 because “[t]he court did not vacate the *UNE Remand Order*.”²⁹ In a subsequent order, however, the Commission corrected that statement, and conceded that the D.C. Circuit’s decision in *USTA I* had, in fact, vacated the *UNE Remand Order*. Specifically, it held in the *Triennial Review Order* that *USTA I* had “vacated” the “list of mandatory UNEs” adopted in the *UNE Remand Order*, which included shared transport, and that once the *USTA I* decision became “final and no longer subject to further review . . . the legal obligation [to provide those UNEs] w[ould] no longer exist.”³⁰ That determination – which no party challenged in the D.C. Circuit – is binding and, by the Commission’s own logic and the plain terms of the sunset provisions of Conditions 17 and 19, confirms that both Conditions 17 and 19 sunset on March 24, 2003, once the D.C. Circuit’s decision in *USTA I* became final and non-appealable.

III. THE COMMISSION CANNOT AND SHOULD NOT MODIFY CONDITION 17

In addition to rejecting the CLECs’ claim that Condition 17 did not sunset on March 24, 2003, the Commission should reject any suggestion that the sunset provision of Condition 17 should be modified to allow its continued operation. The merger conditions represent specific commitments made by SBC and Ameritech in conjunction with their applications for transfers of licenses and authorizations from Ameritech to SBC, and accepted by the Commission as sufficient to render those transfers in the public interest. Because SBC and Ameritech were agreeing, in order to get their merger approved, to fulfill extensive obligations with potential payments in the billions of dollars for failures to meet those obligations, the provisions were carefully and narrowly drafted to avoid open-ended or vague obligations. Except in certain narrow circumstances (such as the carrier-to-carrier performance plan, which permitted the Chief

²⁹ *Id.* ¶ 19 n. 55.

³⁰ *Triennial Review Order* at ¶ 31, and ¶705 (emphasis added).

of the Common Carrier Bureau to add up to three qualifying submeasures for new services or UNEs), the conditions do not provide that the Commission may modify SBC's commitments without its concurrence. The conditions thus represent an agreement between SBC/Ameritech and the Commission, and must be interpreted in that light.

SBC and Ameritech consummated their merger based upon the conditions as written and accepted by the Commission. While the Commission can, of course, waive one or more of these conditions for good cause, it cannot and should not up the ante after the fact, and impose new, more onerous requirements now that the merger is complete. There is simply no basis to conclude that the sunset provisions of Condition 17 should be modified. In the *SBC/Ameritech Merger Order*, the Commission concluded that SBC's commitments as written balanced competing policy considerations and were sufficient to promote the public interest. For this reason, the Commission rejected various requests by commenters to expand SBC/Ameritech's commitments. Nothing has changed in the intervening years. Accordingly, the Commission should not lengthen the duration of SBC's commitment in Condition 17 beyond that contemplated by SBC and accepted by the Commission.

IV. CONCLUSION

The CLECs' petition requesting that the Commission declare that merger Condition 17 remains in effect is contrary to the plain terms of Condition 17 as well as its underlying purpose and intent. Accordingly, SBC respectfully requests that the Commission deny the CLECs' petition.

Respectfully Submitted,

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